

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THOMAS E. HELMSTETTER

Claimant

VS.

MIDWEST GRAIN PRODUCTS, INC.

Respondent

Self-Insured

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Docket No. 222,191

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Bryce D. Benedict on August 28, 1998. The Appeals Board heard oral argument April 14, 1999.

APPEARANCES

Bruce Alan Brumley of Topeka, Kansas, appeared on behalf of claimant. Timothy G. Lutz of Overland Park, Kansas, appeared on behalf of respondent.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award. In addition, the Board also considered the records attached to the parties' Stipulation filed April 19, 1999 and Amended Stipulation filed August 30, 1999.

ISSUES

The Award grants benefits for a whole body disability based upon a 38 percent functional impairment followed by a work disability. The functional disability is based on the stipulated 19 percent functional impairment rating to the right arm plus a 30 percent functional impairment for post-traumatic stress disorder (PTSD). The work disability award commences on the day following claimant's January 29, 1996 resignation from his employment with respondent. On appeal respondent contends the disability award should be limited to the scheduled injury to the arm.

The nature and extent of claimant's disability is the only issue for review. The additional issues raised before the ALJ and in the respondent's Application for Review by Workers Compensation Board were withdrawn during oral argument to the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to account for the new post-injury wage information submitted by the parties, but should otherwise be affirmed.

The Board agrees with and adopts as its own the findings and conclusions stated by the ALJ in his Award. We agree that the evidence proves claimant developed post-traumatic stress disorder as a direct result of the July 13, 1995 accident.

The parties agree that claimant sustained a 19 percent functional impairment to his right arm as a result of the July 13, 1995 accident. The Board finds that, in addition to and as a direct result of that accident, claimant developed PTSD and has a 30 percent psychological impairment. Disabilities resulting from psychological injuries are compensable under the Workers Compensation Act when the condition is directly traceable to a compensable physical injury.¹ Thus, this claim is compensable as a whole body impairment. The ALJ, after converting the 19 percent impairment to the arm to an 11 percent whole body impairment, used the combined values chart in the AMA Guides to find claimant had a total functional impairment of 38 percent.² The ALJ went on to award claimant a 68.6 percent work disability based upon an 83.3 percent task loss and a 53.8 percent wage loss for the period beginning January 30, 1996 when claimant left his employment with respondent through February 27, 1998. Beginning February 28, 1998 claimant received another pay raise which dropped his wage loss to 52.5 percent and his permanent partial disability to 67.9 percent.

Respondent argues that claimant is not entitled to a work disability because claimant demonstrated he retains the ability to perform his preinjury job as evidenced by the fact that claimant returned to that job without accommodation following treatment for his right arm injury. The Appeals Board disagrees. Claimant left work as a direct result of his PTSD. Claimant tried to return to his former job duties but, because of his PTSD, that work became unbearable for him. As Dr. Elizabeth R. Hatcher explained, the work environment was an aggravating factor. Dr. Roy B. Lacoursiere agreed.

Respondent's contention that claimant could have bid on other jobs away from the fungi operations department is a logical one, but PTSD is not logical. Even though such a transfer would have removed claimant from the immediate vicinity of the accident, claimant needed to be away from Midwest Grain altogether. This is borne out not only by claimant's testimony but by that of the experts as well. This is also supported by the fact that claimant's PTSD symptoms worsened while at Midwest Grain and lessened after he

¹ Rund v. Cessna Aircraft Co., 213 Kan. 812, 518 P.2d 518 (1974).

² This 38 percent functional impairment combines the 30 percent functional impairment as a result of the PTSD with the 11 percent impairment from the physical injury to the right arm.

left. Respondent's assertion that the Lowmaster³ decision requires that claimant give respondent an opportunity to accommodate claimant is inapplicable to this factual situation. Claimant simply could not work at Midwest Grain in any capacity. Furthermore, in subsequent opinions the Court of Appeals has clarified its holding in Lowmaster. In Oliver⁴ the Court held that a claimant is not required to request accommodations, but instead that is only one factor to be considered in determining good faith.

Finally, respondent cites the Watkins⁵ decision for the proposition that where an injured employee returns to work at the same job and earns a comparable wage to what he earned before the injury, there can be no work disability absent evidence of a change in the employee's physical condition. In this case the change was in claimant's psychological condition, not his physical condition. We do not believe the Court of Appeals in Watkins was drawing a distinction between physical versus psychological injury. That distinction aside, in this case claimant left work due to his injury. Watkins lost his job when Food Barn went out of business. In addition, the Watkins case involved a different definition of work disability. The former version of K.S.A. 44-510e involved an ability test both as to jobs and wages. But the current statute defines task loss during a specific 15-year period and wage loss based upon what the employee "is earning" as opposed to loss of ability to earn. Under the present statute ability only becomes relevant when an employee is not acting in good faith to find appropriate employment. The Board finds claimant acted in good faith in leaving his employment with respondent. It was not until claimant voluntarily left his Wal-Mart job in June of 1998, for reasons unrelated to his injury, that the ALJ found a wage should be imputed based upon claimant's ability. The Board agrees with the ALJ's decision to impute the wage that claimant was earning at the time of his voluntary termination from Wal-Mart. But a comparable wage will not be imputed because of claimant's "voluntary" termination from his job with respondent because that termination was necessitated by his injury, specifically the PTSD.

During oral argument to the Board, counsel for the parties agreed that claimant was now working at a job he obtained after the close of the record before the ALJ. By agreement of the parties, that new wage information has been submitted to the Board to be considered in determining claimant's post-injury wage. Those records show claimant was hired as a full time employee by Northwest Pipe Company on July 21, 1998 as a third shift Quality Control Technician at a base wage of \$7.50 per hour. In addition, there appears to have been a \$.40 per hour shift differential. On March 1, 1999 claimant's base hourly pay rate changed from \$8.00 to \$8.60. There is no corresponding document

³ Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ____ Kan. ____ (1998).

⁴ Oliver v. The Boeing Company, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* ____ Kan. ____ (1999).

⁵ Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

showing the date of claimant's raise from \$7.50 to \$8.00 per hour, but from the other payroll records provided it appears to have been on November 1, 1998.

A letter dated March 31, 1999 states: "Thomas Helmstetter receives employer paid medical and dental insurance. The total employer paid premium is \$132.58 per month." The letter does not state when claimant began receiving this \$30.60 per week⁶ additional compensation, so it will be treated as having commenced immediately. Accordingly, claimant's post-injury average weekly wage was \$346.60 from July 21, 1998 through October 31, 1998; \$366.60 from November 1, 1998 through February 28, 1999; and, \$390.60 thereafter. When compared to claimant's pre-injury average weekly wage, the corresponding wage loss is 51 percent from July 21, 1998 through October 31, 1998, a period of 14.71 weeks⁷; 48 percent from November 1, 1998 through February 28, 1999, a period of 17.14 weeks⁸; and, 45 percent thereafter⁹. When the 51 percent wage loss is averaged with the 83.3 percent tasks loss the work disability becomes 67.15 percent; the 48 percent wage loss reduces the work disability to 65.65 percent, and, with a 45 percent wage loss the work disability is 64.15 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated August 28, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Thomas E. Helmstetter, and against the respondent, Midwest Grain Products, Inc., for an accidental injury which occurred July 13, 1995. Claimant is entitled to 2.86 weeks of temporary total disability compensation at the rate of \$326.00 per week or \$932.36; followed by 25.86¹⁰ weeks at the rate of \$326.00 per week or \$8,430.36, for a 38% permanent partial general disability; followed by 108.43 weeks at the rate of \$326.00 per week or \$35,348.18, for a 68.6% permanent partial general disability for the period from January 30, 1996 through February 27, 1998; followed by 20.43 weeks at the rate of \$326.00 per week or \$6,660.18,

⁶ $\$132.58 \text{ per month} \times 12 = \$1,590.96 \div 52 = \$30.60.$

⁷ A base hourly rate of \$7.50 plus a \$.40 shift differential for \$7.90 x 40 hours = \$316.00 + \$30.60 = \$346.60.

⁸ A base hourly rate of \$8.00 plus a \$.40 shift differential for \$8.40 x 40 hours = \$336.00 + \$30.60 = \$366.60.

⁹ A base hourly rate of \$8.60 plus a \$.40 shift differential for \$9.00 x 40 hours = \$360.00 + \$30.60 = \$390.60.

¹⁰ The ALJ used 28.86 weeks but we have corrected this to reflect the period covered.

for a 67.9% permanent partial general disability for the period from February 28, 1998 through July 20, 1998; followed by 14.71 weeks at the rate of \$326.00 per week or \$4,795.46, for a 67.15% permanent partial general disability for the period from July 21, 1998 through October 31, 1998; followed by 17.14 weeks at the rate of \$326.00 per week or \$5,587.64, for a 65.65% permanent partial general disability for the period from November 1, 1998 through February 28, 1999; and 76.79 weeks at \$326.00 per week or \$25,033.54, for a 64.15% permanent partial general disability for the period after March 1, 1999, making a total award of \$86,787.72.

As of November 30, 1999, there is due and owing claimant 2.86 weeks of temporary total disability compensation at the rate of \$326 per week or \$932.36, followed by 225.85 weeks of permanent partial compensation at the rate of \$326 per week in the sum of \$73,627.10 for a total of \$74,559.46, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$13,160.62 is to be paid at the rate of \$326 per week, until fully paid or further order of the Director.

The Appeals Board otherwise approves and adopts all other orders entered by the Administrative Law Judge in the Award.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce A. Brumley, Topeka, KS
Donald J. Fritschie, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director